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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHESAPEAKE BEACH RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR CHESAPEAKE BEACH RAILWAY COMPANY.

Opinion Below.

The opinion of the specially constituted District Court is reported in 59 W. L. R. 410 (adv. sheets, June 19, 1931, No. 25) and is set forth in the record (R. 43).

The report of the Interstate Commerce Commission[1] (R. 18) is reported in 166 I. C. C. 293.

Questions.

The appellant, Claiborne-Annapolis Ferry Company, is seeking to set aside an order of the Commission authorizing the Chesapeake Beach Railway Company to extend its railroad across Chesapeake Bay by ferry.

The principal questions in issue before the Court are:

1. The right of a competing carrier like appellant, which is serving a different territory and whose ferry franchise is not infringed, to maintain the present suit.

2. Whether the appellant is entitled to the interposition of a court of equity to protect its present excessive and illegal profits.

3. Whether the order construed as authorizing a strictly railroad ferry is supported by the evidence.

4. Whether the Commission has sole jurisdiction over an extension of an interstate railroad where the extension is over navigable water of the United States, by a ferry intended for both railroad and general vehicular and passenger traffic of an interstate character.

---

[1]For convenience, we shall in this brief usually refer to the appellant as the Ferry Company, the Chesapeake Beach Railway Company as the Railroad, or the Railway Company, and the Interstate Commerce Commission as the Commission.

Statutes Involved.

The pertinent statutory provisions are part of paragraph 3, and the whole of paragraphs 18, 19 and 20 of section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478 (U. S. C. Title 49, Sec. 1 (3), (18), (19), (20)), which read as follows:

> (3) "* * * The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"
>
> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of

railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest, and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Statement.

The statement in the brief for appellant is, except where concerned with the purely procedural steps,

really a part of its argument. The facts recited are largely confined to those supporting its theory of the case. A few corrections will be noted here, while in order to avoid duplication, the others will receive attention in the succeeding portions of this brief devoted to the question whether the evidence of record is sufficient to support the order of the Commission.

The Chesapeake Beach Railway Company is a carrier subject to the Interstate Commerce Act, its line extending from Chesapeake Junction, D. C., through Marlboro, Pennsylvania Junction, and Owings to Chesapeake Beach, Md., 29.04 miles (R. 18). Connection is made at Chesapeake Junction with a line of the Baltimore & Ohio Railroad Company, and at Pennsylvania Junction with a line of the Pennsylvania Railroad Company. Freight is regularly handled in interchange with those carriers (R. 19). The railroad is a party to joint rates with them (R. 61).

On page 5 of the brief for appellant it is stated that the railroad is hopelessly insolvent; that it is in default in the payment of principal and interest of its first mortgage bonds which matured in 1923; and that there are other liens and claims against the property of varying amounts. It should be noted in this connection, however, that all stocks and bonds of the company are owned by William V. Hodges, Trustee (R. 139), who is also the holder of the liens and claims against the property (R. 19). Mr. Hodges has agreed to satisfy and discharge of record the present first mortgage, and all other liens and claims held by him, so that the mortgage to secure the proposed issue of $750,000 of bonds to equip the ferry, will be a first

lien upon all of the physical assets of the company (R. 140). The financing of the venture has not yet received the attention of the Commission, whose approval will be necessary before any securities can be issued (R. 31). The very existence of this litigation is ample evidence that the appellant itself places little reliance in the proposition that the railroad is unable to command sufficient financial resources to support the new enterprise.

In 1929, for the first time in recent years, the railroad earned a net railway operating income of $7,439.59, which was made possible by a reduction in maintenance of way and structures and maintenance of equipment expenses. These economies, however, were not at the expense of deferred maintenance (R. 63). The improved showing was coincident with the assumption of management by Mr. Eugene Fox, the present Executive Vice-President, a man of broad experience in railroad operation (R. 60, 72).

The appellant operates a ferry between Annapolis and Claiborne, twenty miles further up the Bay from the proposed railroad ferry (R. 144A). The territory served by it is naturally distinct from that tributary to the new ferry. Its operations from 1924 to the date of the hearing were profitable and were extremely large in the years 1928 and 1929. These matters will be treated in more detail in a later part of this brief given over to a consideration of the evidence relative to a general vehicular and passenger ferry at Chesapeake Beach.

SUMMARY OF ARGUMENT.

I.

The order of the Commission is valid and may be upheld either (1) when construed as authorizing the construction and operation of a strictly railroad ferry, or (2) when construed as authorizing both a railroad and a general vehicular and passenger ferry.

II.

The lower court properly held that the scope of the order of the Commission, whether covering the operation of a strictly railroad ferry or both a railroad and a general vehicular and passenger ferry, is not necessarily involved in this proceeding. The railroad is required by law to secure permission of the Commission before constructing and operating a ferry in connection with its line, even though it might also be compelled to secure the consent of other authorities with respect to all or any part of the contemplated business.

III.

The lower court properly held that the record discloses evidence supporting the finding of the Commission of a present and future public convenience and necessity requiring the establishment of this ferry. The evidence clearly supports the need for additional transportation facilities of the Eastern Shore of Maryland which will be reached by the proposed ferry. There is substantial evidence of a more specific nature relating to the need for a railroad ferry in the strict sense of the term used by appellant. In determining

whether the venture is likely to be self-sustaining, the Commission may take into consideration both interstate and intrastate traffic, and may likewise take into account general vehicular and passenger traffic as well as that of a strictly railroad nature. The Court will sustain the Commission's order if supported by evidence, and will not itself weigh the evidence or inquire into the correctness of the Commission's reasoning or the soundness of its conclusions.

IV.

The order is valid when construed as covering both railroad and general ferry service. The Commission has exclusive jurisdiction over ferries operated in connection with interstate railroads. This court has definitely determined that the general or non-railroad business of an interstate nature done by a ferry operated in connection with a railroad was subject to the Interstate Commerce Act as it stood before 1920, and was beyond state control. The case where this holding was made, *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, is controlling in the present case. The provisions of section 1 (18-20) enacted in 1920, empowering the holder of a certificate of public convenience and necessity from the Commission to proceed with construction and operation "without securing approval other than such certificate" constitutes an added assertion of exclusive Federal control over the whole field subject to the jurisdiction of Congress. This field covers all of the business of the proposed ferry of every kind and description because the ferry is not only on a navigable water of the United

States and therefore subject to Federal regulation, but is also within Federal jurisdiction as an instrumentality of interstate commerce forming part of interstate highway movements of busses, trucks and private automobiles.

V.

As a public service corporation, the appellant is entitled to earn nothing more than a fair return upon the value of the property employed in its business. Its present earnings are greatly in excess of such fair return. The operation of the new ferry will leave it with a fair return and it is not entitled to interposition of a court of equity for the protection of the excessive and illegal profits now enjoyed.

VI.

The appellant was without a franchise at the commencement of these proceedings.

Its present franchise is not exclusive and does not extend along the route of the new ferry or within the same territory. As a mere competitor whose business may be hurt to some extent by the operation of the new ferry some twenty miles down Chesapeake Bay, appellant has no standing to maintain the present suit. The provision of section 1 (20) of the Act authorizing suit by any party in interest in certain cases does not apply here beause no violation of section 1 (18-20) is involved.

VII.

The lower court was correct in holding that the railroad had authority under its charter to conduct a rail-

road business, and the operation of a ferry in connection with, or in the extension of, its regular line is an incident of that business. Moreover, its charter power to own and employ steamboats or other vessels to connect its railroad with other points by water communication is, when coupled with the certificate of public convenience and necessity which it holds, sufficient to cover the operation of a ferry. In any event, the question of lack of charter power or *ultra vires* action cannot be raised by the appellant in a collateral proceeding like the case at bar.

ARGUMENT.

I.

A certificate from the Commission was necessary before the railroad could operate a ferry in connection with its line and the scope of the certificate is not necessarily in issue here.

Section 1 (18) of the Act prohibits any interstate railroad from undertaking an extension of its line without first obtaining a certificate of public convenience and necessity from the Commission. The extension of the railroad line across Chesapeake Bay by ferry is an extension within the purview of the statute because of the language of paragraph 3 of the same section defining the term "railroad" as including "ferries used by or operated in connection with any railroad."

The railroad could not construct or operate the proposed ferry except with a certificate from the Commission, without making it and its officers liable to the

penalties of fine or imprisonment prescribed by section 1 (20).

Any sort of ferry operated by the railroad from its present eastern terminus at Chesapeake Beach across the Bay to the Eastern Shore would be a physical and literal extension of its line. The company would unavoidably have some passenger and freight business moving across the Bay which would be handled over the rail line between other points, and this would automatically make its ferry one used by or operated in connection with an interstate railroad, which would require the authority of the Interstate Commerce Commission. At the same time it might be that the proposed ferry could not do a general vehicular and passenger business without a permit from Maryland authorities. If that were true, as appellant urges that it is, the situation would merely be of a type quite common to our system of government, where it is requisite to have official approval of a new enterprise from two jurisdictions, one state, and the other federal. Under these circumstances there would be no established order in which the application would have to be made. It would be equally permissible to seek the consent first of the federal and then of the state authorities, or to proceed in reverse order.

The order of the Commission is not invalid by reason of the failure of the railroad up to this time to secure authority for a ferry from the State. Its scope presents a different question and one which may never arise. It might of course arise if the company undertook construction or operation without state authority and the State or other parties with a legal interest sought to

oppose. But it is not necessarily in issue here, and there is no call for reversal of the decision of the lower court to that effect.

II.

There is substantial and convincing evidence of the necessity for a strictly railroad ferry and the findings of the Commission on this point are conclusive.

(A) *The Evidence on This Question is Substantial.*

The lower court found that there was substantial evidence in the record supporting the need for a strictly railroad ferry (R. 47). The finding of the Commission was to the same effect, since the application before it contained an allegation that the present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the Eastern Shore of Maryland (R. 125), and since it found that the allegations set forth in the application had been sustained (R. 32).

A part of the evidence underlying this finding by both tribunals is quoted in the brief for appellant which subjects it to an intensive process of destructive criticism until it has been made to disappear entirely as if touched by a magician's wand and become no evidence at all.

But unfortunately for appellant, the evidence handled in this fashion is not, as it asserts, all that is disclosed by the record touching on the need for a ferry to handle each of the two kinds of traffic pertaining

to a strictly railroad ferry, (1) passengers from points on the railroad to the contemplated station on the Eastern Shore at Hudson, or in reverse direction, and (2) package or less-than-carload freight. In our view this claim is wholly unjustified because it ignores a very substantial body of testimony, some of which is equally applicable to both a strictly railroad ferry and a general ferry, while other of it bears specifically and solely on a railroad ferry. The testimony which has been overlooked or misunderstood or for some reason left out of what purports to be a complete statement of the record on this phase of the case, is not only of more importance than what is included, but also of such a character as to be the really controlling factor, were the inquiry concerned with the weight of the evidence rather than its existence in substantial measure.

This disregarded evidence consists of, (1) the strong and imposing showing of the comparative isolation of the prosperous and productive lower Eastern Shore of Maryland and Virginia, due to the inadequacy and insufficiency of its transportation facilities, (2) the need for new sources of traffic for the railroad in order to produce revenues requisite for the continuation of its services to the territory now dependent upon it for transportation, and (3) the specific evidence relating to railroad ferry service which is simply overlooked.

1. The present isolation of the lower Eastern Shore of Maryland and Virginia and its need for more adequate transportation facilities abundantly appears.

Mr. Eugene Fox, Vice-President of the Railway Company, who had made a study of the situation with

respect to the ferry project, testified that a great many tourists do not now go to the Eastern Shore by reason of its isolation and lack of transportation facilities (R. 70).

Mr. Charles W. Purnell, manager of a hotel at Ocean City, Md., said that more direct and expeditious communication with Washington was needed to increase the tourist business of Ocean City. A person owning an automobile, he stated, could go very nicely by way of Claiborne, but one without a car has difficulty in getting to Ocean City (R. 87).

Mr. Carroll E. Bounds, a lawyer of Salisbury, Md., testified that his section shipped a great deal of perishable produce in trucks to Washington, that present facilities were rather unsatisfactory, and that a great many of their shippers oftentimes drive the trucks all the way around the head of the Bay by Elkton to get to Washington with their produce. He was interested in the ferry because he favored anything that would open up his section of the country (R. 90).

Mr. John B. Gray, Jr., a lawyer of Prince Frederick, Md., stated that the two parts of the state, the Eastern and Western Shores, were separated by Chesapeake Bay, and that any direct method of communication would be a desirable improvement (R. 91).

Mr. Frank Robbins, a real estate and insurance agent of Cambridge, Md., testified that the people of the Eastern Shore feel that they are not getting all that is coming to them in the way of transportation; that they do not have sufficient outlets for their products, and that in the last five or six years there has been a move-

ment for better transportation and better industrial relationships for the whole peninsula (R. 97).

Mr. Arthur C. Smith, Chairman of the Transportation Committee of the Washington Chamber of Commerce, placed his committee on record as believing that the proposed ferry would open up business relations between the Eastern Shore and Washington. The mode of ingress and egress to and from the Eastern Shore he regarded as unsatisfactory at the present time (R. 100, 101).

Mr. Dorsey W. Hyde, Jr., Secretary of the Washington Chamber of Commerce, said that the Eastern Shore of Maryland is perhaps one of the richest agricultural territories within reasonable access to Washington, and one which should be included in its natural trade area, but is now absolutely cut off except through some such means as the proposed ferry (R. 102).

The testimony of Mr. John M. Dennis, Vice-President of the ferry company, is to much the same effect, although he quite naturally exhibited hostility to any project which would interfere with the present situation under which most East and West traffic between the Eastern Shore and the mainland is forced to take to the highways and to use his ferry. He said that the subject of increased transportation facilities for the Eastern Shore is never quiet, but a perennial matter like the flowers which bloom in the Spring. In 1930 it was a bridge proposition. The Governor of Maryland declared publicly that a bridge to the Eastern Shore must be built, the cost of which was estimated at from ten to forty millions of dollars, with a length of 8¾

miles over water, probably the most stupendous engineering effort of the kind ever attempted (R. 115).

2. The Railway Company, forming a connecting link between Washington, D. C., and Chesapeake Beach, Md., and serving the intermediate territory, is in need of new sources of traffic if it is to continue to perform its present public obligations. It formerly derived most of its revenue from passenger traffic. With the advent of the automobile and improved highways, revenue from this source has for the past five years shown a steady decline, although this has been equalized to some extent by the increase in freight traffic due to the increase in population and business activity of the towns and communities served (R. 62). The year 1929, however, was the only year, in recent times at least, in which there has been a net profit (R. 63). While the prospects for the road for the future are better with the present more experienced and efficient management, there is need for additional sources of traffic if the road is to be assured of survival. Mr. Eugene Fox testified that the addition of the ferry service would enable the railroad to be self-sustaining and to make a return; and that based upon his twenty years' experience as an operating railroad man he thought the operation of the ferry as an adjunct to the railroad would help to rehabilitate it and enable it to earn its way, which it has never done before (R. 71).

3. As already stated, the excerpts from the record set out on pages 27 to 33 of appellant's brief do not, as they purport to do, include all the specific evidence re-

lating to railroad ferry service solely. Mr. Fox stated that the applicant believed that the earnings of both freight and passenger traffic could be materially increased by the extension of a ferry service (R. 62). In explaining how he arrived at his estimate of 182,500 passengers in connection with his revenue calculations, he stated:

> "Assuming that we would handle two hundred and fifty cars per day, average, and the further assumption that each car would contain two paid passengers together with the prospective business that might be handled in connection with bus lines *or in connection with our railroad which would bring the passengers to and from the ferry,* we arrived at that figure" (R. 67). (Italics ours).

Mr. Fox testified that the railroad mileage from Chesapeake Junction to Chesapeake Bay is considerably less than the mileage from Washington to Annapolis by rail (R. 76).

The most important omission, however, on this branch of the case is the complete absence from appellant's attempted full statement of all of the evidence bearing solely on the railroad uses for the ferry, of the testimony of Mr. Edgar Morris, President of the Morris Sales Company, Washington, D. C., wholesale distributors of gas and electric appliances, representing the Pittsburgh Water Heater Company, and the Roberts-Anderson Stove Company. Mr. Morris stated that his company distributed their products along the Eastern Shore from warehouses located in Washington, and that it could use the proposed ferry

to very good advantage in making less-than-carload shipments to the Eastern Shore. The company often makes less-than-carload shipments to Crisfield, Salisbury, and other places located there (R. 100).

The term "less-than-carload" has reference to shipments of goods in quantities insufficient to require a whole railroad freight car. It clearly refers to rail movement because neither literally nor as a result of usage has it any significance in relation to motor truck transportation.

Before considering the weight and effect of this evidence so cavalierly ignored by appellant, it is in order to inquire into the soundness of its contention that the record affirmatively shows that there is no need for a new ferry to handle through package freight, and that this conclusion is established by the fact that its own ferry handled little or no freight in the years 1922-1929 (R. 31, 185). Its Vice-President, Mr. Dennis, when asked point-blank whether he had ever attempted to develop any freight business, admitted that he had not because "Our freight business is developed through the truck. They put freight in trucks, and we get it that way" (R. 121). The ferry company has no incentive to develop this type of traffic. It does a very big business with private automobiles, busses and trucks, and its boats are sometimes so over-taxed that they can not handle all of the business offered (R. 103). The railway company on the other hand would have an incentive to develop this package or less-than-carload freight business, because it would receive not only compensation for the trans-bay movement as in the case of the ferry company, but also revenue from

the movement over its rail lines. The testimony of Mr. Morris conclusively shows that it would get some such business (R. 100).

(B) *Similar Evidence Has Been Held Not Only Substantial But Controlling.*

The next question relates to the criterion by which this evidence is to be weighed or measured. Appellant cites *Application of Utah Terminal Ry.*, 72 I. C. C. 89, 92, as holding "public convenience or necessity," as used in the quoted statute, has been defined to mean a "strong or urgent public need." In that case, however, the applicant sought approval of a short line paralleling a branch of the Denver and Rio Grande Western Railroad Company, which was denied by the Commission, which said in the course of its opinion at page 93:

> "A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, the provisions of paragraphs (18) to (20), inclusive, of section 1 negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies."

The definition of the phrase "public convenience and necessity" must be considered in the light of the facts

in the case in which it is given. Each case must be judged by its own facts. In *Chesapeake and Ohio Railway Co.* v. *U. S.*, 283 U. S. 35, 75 L. ed. 824, this Court said at page 42:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

The Commission, however, must be mindful of the considerations actuating Congress in assuming regulatory control over extensions of interstate carriers, which were summed up by this Court in *Texas and N. O. R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 72 L. ed. 661, 663, as follows:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

Where a common carrier proposes to extend its line into new territory, it must necessarily rely upon estimates of potential traffic, and above all, upon the sound business judgment of its officers with respect to the amount of business that can be attracted. In the very nature of things, future prospects cannot be made the subject of the same sort of definite and certain evi-

dence that is demanded in respect to past transactions, and less evidence and a smaller degree of certainty are requisite.

The development of traffic is necessarily somewhat speculative. In *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C., 237, the Commission said at pages 255-256:

> "The problems in convenience and necessity cases have been intensified by uncertainty as to how the law should be interpreted. Apparently the earnings in prospect for the applicant will be insufficient for some time to sustain the project as an independent enterprise . * * *. When it is established, however, that a project will render important public service, and its sponsors are willing to assume the risk of loss in the expectation of ultimate gain either directly through the property or indirectly through benefits to themselves and to the shipping community, the requirements as to the public interest may be fully satisfied, although losses to investors seem more probable than gains. * * * The history of railway construction illustrates that prospective tonnage depending for its development upon transportation facilities, rather than tonnage immediately in view, has been the main justification for railway construction. Progress has involved risks. It is not to be presumed that the Congress contemplated discarding, as insufficient, conditions which in the past have furnished the warrant for a constructive policy in the upbuilding of the system of transportation. It is rather to be presumed that the Congress did not contemplate an interpretation of its enactment which, applied as a policy in the past,

> would have prevented the construction of many railway properties now serving the public interest in an important way. Prospective earnings or losses may properly be considered as one of the factors evidencing the public interest, but, taken alone, do not determine whether a particular enterprise is or is not required by public convenience and necessity."

A certificate of public convenience and necessity for the construction of an extension may properly be granted to create additional tonnage and assist in keeping the present line in operation. *Tennessee, A. & G. Ry. Co. Construction,* 76 I. C. C. 593, *New Mexico Central Ry. Co. Construction,* 99 I. C .C. 389, *Oneida & Western R. Co. Extension,* 166 I. C. C. 277.

An extension is in the public interest if it relieves the situation in a territory inadequately served by the present transportation facilities. *Construction of Line by Wenatchee Southern Ry. Co.,* 90 I. C. C. 237, 255, *Gt. Northern Ry. Co. Construction,* 166 I. C. C. 3, 39.

The judgment of the officials of a railroad based upon their knowledge of local conditions and confirmed by their willingness to take the financial risks involved in a new project constitutes substantial evidence in cases of this kind and may properly be given controlling effect. The Commission so held in *Tennessee, A. & G. Ry. Co. Construction, supra,* at page 596, saying:

> "The record is not as conclusive as it is desirable that it should be regarding the future prospects of the proposed enterprise. However, the record is conclusive to the effect that the

existing mileage alone cannot be successfully operated, and affords reasonable warrant for the expectation that the line as completed will be successful. The applicants have expressed their willingness to finance the extension through the sale of stock. They believe the project as a whole can be made a success, and in view of their knowledge of the local situation and their confidence in the future, as attested by their financial undertaking, we conclude that they should be permitted to develop the enterprise."

(C) *Findings of Commission Where Supported By Any Substantial Evidence Will Be Accepted as Binding*

It is well settled that the courts will not attempt to weigh the evidence or to inquire into the correctness of the Commission's reasoning or the soundness of its conclusions.

"It is not for courts to weigh the evidence introduced before the Commission * * * or to enquire into the soundness of the reasoning by which its conclusions are reached * * * or to question the wisdom of regulations which it prescribed * * *"

Assigned Car Cases, 274 U. S. 564, 580.

"But if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action."

Chicago, R. I. & P. R. Co. v. *United States*, 274 U. S. 29, 33.

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by

a tribunal 'informed by experience.' * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Virginian Ry. v. *United States,* 272 U. S. 658, 665.

"To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

New England Divisions Case, 261 U. S. 184, 204.

(D) *The Evidence is Not Only Substantial But Convincing By Its Weight*

The situation presented by the record is that of an interstate railroad with ample transportation facilities suffering from a dearth of traffic in a territory where it is nevertheless performing a necessary public service, while just across the waters of the Chesapeake lies a rich and productive area in comparative isolation suffering from a lack of transportation, but with an active and alert citizenry ready to cooperate with a new enterprise undertaking to supply its needs.

There is likewise the solution offered in the project proposed by the railroad, involving, in part, a combination rail and water service between Washington and the Eastern Shore. Under this plan not only is a ferry to be constructed but considerable expenditures are to be laid out for the extension of the railroad tracks from their present terminus at Chesapeake Beach over

the causeway and wharf to a point parallel with the ferry slip as shown in the corrected Exhibit No. 16, which counsel have agreed to stipulate in evidence since the printing of the original transcript of record herein.* Additional outlays are to be made for a freight station and a passenger station on the Eastern Shore at Hudson. There is evidence in support of the project from the officials of the company who from their knowledge of the local situation express the opinion that both freight and passenger revenues will be increased by this rail and water service. At least one prominent shipper is on record as promising support to the new route.

There is practically no contrary evidence. There was indeed no opposition before the Commission to a railroad ferry—a circumstance of very great importance to a proper understanding of the evidence on this branch of the case. The ferry company intervened on March 31, 1930, or shortly thereafter and before the hearing (R. 58, 157), and the vigorous controversy occasioned by its objections to the general vehicular and passenger phase of the project undoubtedly accounts in no small measure for the prepon-

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*The statement on page 30 of appellant's brief to the effect that a passenger over the railroad intending to use the ferry would be obliged to leave the train at Chesapeake Beach and proceed a distance of 2,200 feet over a wharf to the ferry slip in order to enter the ferry, was based upon an incorrect copy of Exhibit No. 16 which inadvertently failed to show the extension of the rail line over the wharf to the ferry slip as now shown by corrected Exhibit No. 16.

derant attention given the latter in the record and in the report of the Commission. There is, nevertheless, substantial evidence, in view of what is requisite and practicable in support of an application under section 1 (18-20), in favor of a strictly railroad ferry.

To sanction the construction would assuredly not go counter to the purpose of Congress in enacting the convenience and necessity provisions of the statute of preventing interstate carriers from weakening themselves by constructing superfluous lines and to protect them from being weakened by another carrier's operating in interstate commerce a connecting line not required by the public interest.

Appellant, it is true, argues strenuously that the contemplated rail and water line could not compete with busses and trucks. But this is by no means certain. The railroad has not yet gone the way of the stage coach and the canal. There is little prospect that it will in the near future. Its economic strength, seriously impaired by active competitors within the last few years, is beginning to improve with development of sentiment against the over-crowding of highways by commercial vehicles and the present tendency towards increased taxation and regulation of them.

Appellant likewise charges (Brief p. 55) that the proposal in so far as it relates to the extension of the railroad line is a false pretense since the railroad is really seeking to establish a general ferry between two points entirely within the State of Maryland and having no real use or connection whatsoever with its railroad business. This raises the question of the good faith of the application and of the truthfulness of the

officers of the railway company who testified that they did in fact contemplate a railroad extension. These are matters peculiarly within the province of the Commission which had the parties before it and had an exceptional opportunity to arrive at a correct conclusion concerning them. Its report and order shows that is accepted the application as made in good faith and the testimony of the railroad's witnesses as veracious.

In any true analysis of the case the appellant's contentions go to the weighing of the evidence before the Commission, to the soundness of its reasoning, and the wisdom of its conclusions. Matters of this kind are beyond the scope of the issues in a case reviewing the action of the Commission. But while there is no necessity for considering them, we confidently submit that the findings on this branch of the case are not only supported by substantial evidence, but by evidence of a convincing and persuasive nature.

III.

The evidence is overwhelming in support of the convenience and necessity and profitableness of a general vehicular and passenger ferry.

Testimony of the need of a general vehicular and passenger ferry across the bay at Chesapeake Beach was given by ten representative business and professional men of the District of Columbia and the territory in Maryland to be served by the proposed enterprise, including a Washington representative of the American Automobile Association, and the secretary of the Washington Chamber of Commerce, as well as

the chairman of the Transportation Committee of that body.

The evidence abundantly shows that the proposed ferry would be of great advantage to both the people of the mainland and of the Eastern Shore. It would greatly facilitate communication with the four Maryland and two Virginia counties forming what is known as the lower Eastern Shore, which is partly separated from the upper Eastern Shore by the Choptank River and its wide estuary. The lower section, particularly the Maryland counties, would be naturally tributary to the proposed ferry (R. 64). It would shorten the distance from representative points in that territory to Washington by from 24 to 36 miles (R. 21). Even the partisan vice-president of the Claiborne-Annapolis Company in speaking of the Eastern Shore counties admitted "As to the other counties there is an advantage in there where they proposed to put their terminal, but the Northern part gives us the advantage in distance and the Southern part gives them a slight advantage in distance" (R. 119). The proposed ferry by opening up a new route will develop a great deal of new traffic (R. 70).

The part of the traffic from the lower Eastern Shore now using the Claiborne-Annapolis Company's ferry, does so only because the lack of more convenient facilities forces the use of this long and round-about route. The old ferry and the proposed new one are in reality located in different territories. The extension projected by the railroad, therefore, does not involve a duplication of facilities in a territory now adequately supplied but the introduction of ferry facilities in a territory where none now exist.

Officials of the Chesapeake Beach Railway Company gave detailed estimates of anticipated revenues and expenses which indicated that the operation would be profitable (R. 25). This evidence was accepted by the Commission.

The only testimony in opposition was given by Mr. John M. Dennis, Vice-President of the Claiborne-Annapolis Ferry Company, who predicted financial disaster both for his ferry and the new one, if the latter should attempt to operate. This claim is now echoed in appellant's brief, but is effectively controverted by the evidence of record.

Mr, Dennis proved to be an extremely partisan witness who endeavored to support his thesis by a misrepresentation of the past record of earnings of his company. He attempted to create the impression that his company had earned little money, claiming that the large profits in 1929, the last year before the hearing, were "paper stuff" and not earnings at all (R. 121).

When it was suggested that his company had made $175,000 in the year before the hearing, he endeavored to claim that that was a gross and not a net figure, because "you have to pay for repairs and so on. If you were to get away, on two boats, with $55,000 a year for repairs you would do as well as we are doing" (R. 121). When pinned down by further cross-examination, however, he admitted that the cost of repairs were charged to operating expenses (R. 122).

He claimed that there were three years between 1922 and 1927 when the expenses of his company were considerably above its income without allowing for depreciation and other fixed items which do not appear in

an operating statement (R. 122). As a matter of fact the statements of revenue and expenses (R. 187-201) show a deficit for only two years, 1922 and 1923, and even this showing of deficits is erroneous on its face. In the former year the charges to operating expenses included $10,051.51 for depreciation and $5,020.96 for interest. The latter item is not a proper charge to operating expenses and if this error were corrected there would be an operating income of $3,545.60. In 1923 operating expenses included $11,877.23 for depreciation and $4,029 for interest and if the error with respect to the interest item were corrected there would be an operating income for that year of $719.63 (R. 187).

The operations of the ferry company began to be really profitable as far back as 1924. The rate of return it has enjoyed on its fixed capital in the period 1922-1929 is set out in the table below (R. 187-201):

Year	Fixed capital	Operating income	Rate per cent
1922	$199,010.60	$3,545.60	1
1923	255,168.24	719.63	0.2
1924	227,032.00	16,145.15	7
1925	227,032.00	16,238.76*	6
1926	492,797.00	13,117.18*	2
1927	437,852.00	67,962.00	15
1928	448,858.57**	170,336.70	37
1929	878,505.00	184,990.58	21

* Including interest improperly charged to operating expenses.

** Exclusive of cost of motor ship "Dennis" under construction.

The figures of operating income shown in the above table represent what is left out of operating revenues after all operating expenses have been paid, including repairs and depreciation (R. 191-201). The relatively low income for 1926 is accounted for by a charge against operating expenses of $27,063.94, representing the loss of the vessel "Brennan." The fixed capital is the cost taken from the books of the company and represents the cost new without deduction for depreciation. Since the greater part of it was incurred subsequent to the rise in prices incident to the war, and before the present depression, it is undoubtedly materially greater than current cost of reproduction (R. 111, 121). The rate of return disclosed in 1927, 1928 and 1929 is several times what has become accepted as constituting a fair and legal rate of return for property devoted to the public service.

The trend of the ferry company's receipts has been a constantly upward one for all of the years for which figures are contained in the record. Even more than the statement of profits it reveals the extent of the increase in its business. The operating revenues for the years 1922-1929 are shown in the table below (R. 187-201).

Year	Revenues
1922	$104,286.45
1923	123,408.89
1924	157,272.11
1925	185,866.66
1926	209,999.62
1927	277,604.20
1928	310,979.92
1929	359,509.18

These results were obtained by providing modern, up-to-date equipment and giving better service to the patrons (R. 111, 112). The remarkable response to more adequate ferry facilities on the Bay sustains the theory of the proponents of the new ferry that its construction will encourage traffic and will attract patronage of people who are repelled by the longer and more roundabout route to and from the lower Eastern Shore by way of Annapolis and Claiborne.

The trend of highway traffic is upward. Even if the new ferry takes away some of the business in the next few years, the loss will be made up by the increase in other traffic, if past experience is any guide.

The appellant claims that it will be ruined if the new ferry succeeds in taking away the 32 per cent of its business which Mr. Fox believed came from the lower Eastern Shore and would therefore be diverted to a ferry constructed in that territory (Brief, 45). At another place, however, it contends that no such result is possible (Brief, 58), indicating that it does not take the theory of prospective ruin too seriously. But assuming that the upward trend of traffic will not continue in the future, and assuming a constancy of operating expenses, a reduction of operating revenues of 32 per cent will still not ruin the appellant. On the basis of the record of 1928 it would leave a substantial margin over expenses, amounting to $70,818.37, or a return of 15 per cent on fixed capital. On the 1929 basis, while the net profit would be $69,947.64, or about the same, the rate of return would be reduced to 7 per cent—surely far from a ruinous figure.

It is doubtful whether the existing ferry will be greatly affected by a new one twenty miles away. The old ferry will retain the important traffic destined to and from the northern counties which are naturally tributary to it (R. 77, 119). It will merely lose what it now gets by forcing people to inconvenience themselves. If its future prosperity were, in fact, dependent upon a continuation of this state of affairs, its prospects would be very poor indeed, because it stands to reason that even if the Chesapeake Beach ferry fails to materialize some other form of relief will be obtained by the people of the Eastern Shore. The existing artificial and unnatural monopoly cannot continue.

But in reality the worst result for the Claiborne-Annapolis Company within the range of probability as a consequence of the operation of the Chesapeake Beach ferry, is some diminution of the huge monopolistic profits now enjoyed. The talk of prospective financial disaster is thus far-fetched in the extreme, and it is fully apparent why the Commission paid so little attention to the evidence of Mr. Dennis.

There is no sound reason grounded in the public interest for the protection of the monopoly which the ferry company now possesses at the expense of the inconvenience and loss of a large part of the traveling and shipping public, part of whose traffic is interstate in character. The findings of the Commission on this branch of the case are not only supported by the preponderance of the evidence, but are just and right and should not be disturbed.

IV.

The Commission properly took into consideration intrastate movements and general vehicular and passenger traffic in determining financial prospects of new ferry.

The wisdom of an extension of an interstate carrier usually, if not invariably, involves two questions, (1) the need for the added facilities, and (2) the likelihood of financial success. Tney are closely related because an enterprise fulfilling a real need may with some reason be expected to be successful. In the ordinary situation, therefore, what is evidence of a public need also tends to show financial justification.

In this view, even though it be conceded for the sake of argument that intrastate and general vehicular and passenger traffic of a ferry projected for operation in connection with an interstate railroad are outside of the jurisdiction of the Interstate Commerce Commission, and that it may exercise no regulatory control over such movement, it by no means follows that the needs of such traffic and the revenues which may be anticipated therefrom cannot be considered by the Commission or that the Commission was in error in so doing in this case.

The statute lays down no test which must be met by an application for a certificate of public convenience and necessity, and there is no restriction on the evidence to be considered by the Commission in making its findings on this score. Anything that as a matter

of common sense is reasonably relevant and material may be taken into account. If, as appellant contends, the Commission possesses jurisdiction only over the strictly railroad aspects of the ferry extension, there is nothing in the law which would require it to withhold a certificate unless it were justified by the business solely within its jurisdiction. Neither that class of business taken by itself, nor the class which is beyond its powers, likewise considered separately, might be sufficient to support its issuance, and yet taken together might well afford quite sufficient justification. In this situation it would be absurd for both Federal and State authorities to frustrate the project. The proper course for each authority would be to consider all of the evidence bearing on the whole situation and issue a permit containing appropriate authorization.

It follows that there was no possible error in the course pursued by the Commission in this case in considering the evidence relating to the need for the operation of a ferry at Chesapeake Beach in general vehicular and passenger traffic and the revenues which might be anticipated therefrom.

V.

A ferry used by or operated in connection with a railroad but doing an interstate general vehicular and passenger business is under exclusively Federal control.

A hard and fast distinction is drawn by the appellant between a general ferry business on the one hand and a railroad ferry business on the other. A railroad ferry, it contends, is always one employed as an

integral part of a journey by rail and merely serves as a link in such rail journey, while a general ferry is a part of the public highway spanning a gap of water and subject generally to local control. It cites in support of this distinction, *St. Clair C. O.* v. *Interstate Transfer Company*, 192 U. S. 454; *Golden Gate Ferry Company* v. *Railroad Commission*, 204 Calif. 305; *Fitch* v. *New Haven, New London and Stonington Railway Co.*, 30 Conn. 38; *The Maverick*, 16 Fed. Cas. (No. 9316) 1186; *Chesapeake Ferry Co.* v. *Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561.

All of these cases are distinguishable from the case at bar on a number of grounds, only one of which will be mentioned since standing alone it is sufficient to remove them from consideration. None of them arose under or involves the construction of the Interstate Commerce Act, whose provisions are governing in the present proceedings, and the construction placed upon them by the appellant is opposed to the interpretation by this Court in *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. Ed. 499, the only case in which the Court has had occasion to construe the definition of "ferries used by or operated in connection with a railroad" by section 1 (3). The decision turns squarely on the issue presented in the case at bar, and, as a decision of this Court, is necessarily controlling. Its importance warrants a somewhat extended review.

The Board of Chosen Freeholders of Hudson County, New Jersey, in 1905 enacted an ordinance fixing the rate of ferriage across the Hudson River to New York on the West Shore Railroad ferry of the

New York Central. The business of this ferry was not limited to persons or traffic carried over the line of the railroad, but embraced a large number of persons and a considerable amount of other traffic constantly moving between the two States, not having used or being destined to use the line of the railroad. The Company brought action in the State courts to enjoin the enforcement of the ordinance, and the Supreme Court of New Jersey ruled in its favor. The decision of that Court, however, was reversed by the Court of Errors and Appeals in *New York Central & H. R. R. Co.* v. *Hudson County*, 80 N. J. L. 305, 74 Atl. 954. The Court relied, among other things, upon the same distinction between a general ferry business and a railroad ferry business as is taken by the appellant in this case, as will appear from the following excerpt from its opinion:

> "Now, so far as appears, the ferry company which figures in the present case was entirely unlike the corporation concerned in the *St. Clair* v. *Interstate Transfer Company Case*. The Weehawken Ferry Company seems to have been incorporated in 1852 with the usual privileges of a ferry company. Its business is the transportation of passengers and vehicles, as is that of any other ferry company. The railroad company, as lessee, is the keeper of the ferry and obliged to conduct the business of the ferry. There is no ground disclosed in the record which puts it upon the same footing as the Interstate Transfer Company. Regarding it as a ferry, or as a ferry similar to the Gloucester ferry, the question is whether it has been definitely settled by the Federal Supreme Court that the regulation of its tolls charged by its keeper in New Jersey is

not a subject for regulation by the State of New Jersey."

The Court relied upon the same Interstate Transfer Company case that was cited by the appellant in its brief to show the difference between a railroad and a general ferry. The Court correctly pointed out that the West Shore did a general ferry business whereas the Interstate Transfer Company's operations were confined to the floating of railroad cars across the Mississippi River.

Pushing its distinction further, and answering the contention of counsel for the railroad company, that Congress had taken jurisdiction over ferries operated in connection with railroads when it passed the Interstate Commerce Act, the Court proceeded to say:

> "It is again insisted that the regulation by the State of New Jersey is excluded because Congress has legislated concerning ferries operated in connection with railroads. The Congressional legislation thus alluded to is said to be contained in Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154) and the amendments thereto; but all interstate commerce is not included within the operation of that statute. A ferry is not included. It is true that, when a railroad company uses and operates a ferry, the latter, as a part of the railroad, becomes subject to the Commission's control over railroads. Jud. Int. Com. par. 104, 105. The rates charged by a railroad company for passage over its routes, may be regulated; but the rates charged for ferriage simply, disconnected from the railroad transportation, are not

under the control of the Commission. Indeed, upon neither had the Commission the power to fix rates until the amendment was approved June 29, 1906 (34 Stat. 564, c. 3591), and so cannot affect the decision of this case, because not in existence when the certiorari in this case was sued out on May 1, 1906."

When the case reached this Court the judgment of the Court of Errors and Appeals was reversed. This Court stated in the course of its opinion:

"As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily, at least, put out of view, and the assertion on the other of an absolutely exclusive State power may also be eliminated from consideration, because not relied upon, or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the Gloucester Ferry Case, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the State of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the 1st section of the Act to regulate commerce (Act of February 4, 1887, Chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that the term 'railroad' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any cor-

poration operating a railroad, whether owned or operated under a contract, agreement, or lease." * * * "The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that, as the text only embraces railroad ferries, and the ordinances were expressly decided by the Court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all business of the ferries between the two States was interstate commerce within the power of Congress to control, and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested."

This New York Central Ferry case is of controlling importance in connection with the case at bar because it establishes a federal rule diametrically opposite to

the contention so assiduously advanced by counsel for appellant that in construing the Interstate Commerce Act a distinction must be taken between a railroad ferry and a general ferry. It hews to the line of language used by Congress in defining the type of ferry subject to the Act, as one used by or operated in connection with a railroad. It settles beyond a peradventure of a doubt that Congress in the original Act of 1887 assumed control not only over the railroad business done by a ferry used by or operated in connection with an interstate railroad, but also over all of its non-railroad business of an interstate nature. This was recognized by the Court in *Vidalia* v. *McNeely*, 274 U. S. 676, 71 L. ed. 1292, 1295 where it said:

> "The transportation of persons and property from one state to another is none the less interstate commerce because conducted by ferry; and it does not admit of question that ferries so employed are subject to congressional regulation. Congress has adopted some measures to promote the safety of this form of transportation (Rev. Stat. 4233 (Rule 7), 4426, U. S. C. title 33, 316, title 46, 404) and also a measure regulating rates on ferries operated in connection with railroads. *New York C. & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 263, 57 L. ed. 499, 505, 33 Sup. Ct. Rep. 269."

It must be taken as established therefore, (1) that a "ferry used by or operated in connection with a railroad" is not as appellant contends, limited to a strictly railroad ferry, because the broad language employed, as authoritatively construed by this Court, in-

cludes a combination railroad and general vehicular and passenger ferry, and (2) that all of the interstate business, railroad and otherwise, of such a combination ferry has passed under the regulation of Congress and its agent, the Interstate Commerce Commission, and is no longer within the realm of state authority.

VI.

The proposed ferry will do a general vehicular and passenger business of an interstate character.

Since it is settled by the New York Central Ferry case that the general vehicular and passenger business of a ferry used by or operated in connection with a railroad is subject to the Interstate Commerce Act and completely beyond the power of the states to control where it is of an interstate nature, the next question becomes one whether the proposed Chesapeake Beach Ferry will as a matter of fact and of law be engaged in interstate transportation in connection with its general ferry activities. This is an important question because of the growth of highway travel and the tendency toward the integration of the transportation facilities of the nation by combining under the control of the same companies, railroad and bus and truck operation. Busses and trucks move in interstate commerce a huge volume of traffic which a few years ago went by railroad. *Report of the Interstate Commerce Commission for 1931*, pages 101-107. The Commission has recommended and Congress has under consideration the enactment of legislation to meet the new conditions. Under the Federal Aid Road

Act (39 Stat. 355) Congress has appropriated millions to assist in building the interstate highways over which this traffic moves.

The proposed ferry will be used as a continuation of the network of interstate highways connecting the Eastern Shore of Maryland and Virginia with most of the States of the Union by private automobiles and with Washington and other places, by bus and truck. The interest in connection with such a ferry, since the revolution in transportation caused by the introduction of the motor vehicle, is no longer local, as it was regarded in many of the old ferry cases, long since overruled or at least greatly modified and restricted, by the New York Central Ferry case and other more recent decisions of this court, but nation-wide in its scope.

The carriage by the ferry of busses, trucks and private automobiles and some of its passengers will, it is true, be from one point to another within the state of Maryland. But this one fact is not determinative of the intrastate character of the movement. That the service is performed wholly in one state can make no difference, if it is a part of an interstate movement. *United States* v. *Erie R. Co.* 280 U. S. 98, 74 L. ed. 187 (annotated), *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, 57 L. ed. 226.

It is enough if a carrier participates in the carriage of persons or property originating in one state and destined to another. It is wholly unnecessary that all of the participating carriers should be parties to some common control, management, or arrangement for a continuous carriage or shipment. In *Railroad Commission* v. *Worthington*, 225 U. S. 101, 56 L. ed. 1004,

an order of the Railroad Commission of Ohio was annulled for its attempted effort to fix the rates on lake cargo coal from certain mines to the ports of Huron and Cleveland, all within the state. The coal, however, was intended from the first to be sent to destinations in other states, but by vessels which were not under a common control, management, or arrangement for continuous carriage or shipment with the railroad. The Court said:

> "The situation then comes to this: That the rate put in force is applicable only to coal which is to be carried from the mines in Ohio to the Lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test, transportation of this coal from the mines to the upper lake ports, is an interstate carriage intended by the parties to be such. And the rate fixed by the Commission which is in controversy here, is applicable alone to coal which is thus from the beginning to the end of its transportation in interstate carriage, and such rate is intended to and does cover, an integral part of that carriage, the transportation from the mine to the Lake Erié Port, the placing upon the vessel and the trimming or distributing in the hold if required so that the vessel may complete such interstate carriage."

The specific point in issue was determined against the contention of appellant as long ago as 1871 in *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 L. ed. 999, where the vessel involved was engaged in substantially the same kind of service as is proposed for the ferry in this case. It plied between two points on a river in

the State of Michigan, just as the ferry will ply between two points in the State of Maryland. The Court, however, held that it was subject to regulation under the navigation laws of the United States, saying, (p. 565):

> "In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each

> agency acts in that transportation, it is subject to the regulation of Congress."

A railroad line wholly within one State but forming a link in the chain of communication between several States is clearly an interstate railroad. On the same principle, a ferry which forms a link in an interstate highway route is an instrumentality of interstate commerce. When a thing is put to a use directly facilitating interstate commerce, it is an instrumentality of that commerce, and the use to which it is put rather than its general nature is the determinative factor. *Ruck* v. *Chicago, Etc., R. R. Co.*, 153 Wis. 158, 162, 140 N. W. 1074.

A part of the business of the proposed ferry would consist of conveying common carrier busses and trucks over the waters of the Bay, and in this capacity the ferry would be not only a link in the chain of interstate transportation but itself an actual carrier of interstate vehicles with persons and property aboard moving in interstate commerce.

Boats employed in the business of towing into and out of harbors vessels engaged in interstate and foreign commerce have been held by this Court to be instrumentalities of interstate commerce. *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Foster* v. *Davenport*, 22 How. (U. S.) 244, 16 L. ed. 248. In the last-named case, the court said:

> "It is quite apparent from the facts admitted in the case that this steamboat was employed in aid of vessles engaged in the foreign or coast-

wise trade and commerce of the United States, either in the delivery of their cargo, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination."

The analogy between a towboat conveying in and out of port vessels engaged in foreign or coastwise trade, and a ferry conveying busses and trucks engaged in interstate commerce over a navigable stream of the United States, is complete in all substantial particulars. The auxiliary agent, the towboat in one instance and the ferry in the other, is engaged in aid of the movement of interstate commerce from point of origin to destination. The States may not regulate busses and trucks engaged in interstate movement. *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. ed. 623; *Bush & Sons* v. *Maloy*, 267 U. S. 317, 69 L. ed. 627. By the same reason they have no power of control over ferries which perform an indispensable part of the same movement.

VII.

General ferries even though from point to point within the same State are in the Federal field and are now regulated by Steamboat Inspection Service laws.

Every ferry, whether it be a railroad ferry or a general ferry, operating over the navigable waters of

the United States is within the field of permissible federal regulation.

It has been held that Congress may prescribe regulations in connection with ships and vessels which are engaged only in the transportation of goods and passengers between ports and places in the same State over a navigable water of the United States. *State Tonnage Tax Cases*, 12 Wall. 204, 20 U. S. L. ed. 370. See also the *City of Salem*, 37 Fed. 846, 2 L. R. A. 380, 38 Fed. 762, 4 L. R. A. 125.

Section 4426, Revised Statutes of the United States (U. S. C. Title 46, c. 14, par. 404), provides in part as follows:*

> "The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot:
>
> "* * * All vessels of above fifteen gross tons carrying freight or passengers for hire, * * * propelled by gas, fluid, naphtha, or elec-

* This Section is copied in full in the Appendix to this brief together with Rule 7—Ferry Boats, extracted from General Rules and Regulations Covering Bays, Sounds, and Lakes, other than the Great Lakes, of the United States Department of Commerce.

> tric motors, shall be, and are hereby, made subject to all provisions of Section 4426 of the Revised Statutes of the United States * * *."

Appellant's own ferryboats are now regulated by the Federal Government under this statute. Its Vice-President, Mr. Dennis, said, "The Government Inspectors can see things the matter with boats that nobody else would dream about: Then you have to put the boats in dry dock and do what they say do" (R. 121). And this is true despite the fact that the ferry company is engaged in a general vehicular and passenger service and does not operate in connection with a railroad. The boats of the projected new ferry would likewise be subject to this federal regulation.

It is difficult to see why, if the Federal Government may make regulations with the respect to safety of operation in all of its phases, it may not make a slightly different regulation covering the matter of certificates of convenience and necessity. If the jurisdiction is present in the one case it is assuredly present in the other. The only real question is whether Congress has reached out and extended its jurisdiction in the latter case.

The validity of navigation laws of this type has long since been sustained. *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 L. ed. 999. See also *Vidalia* v. *McNeely*, 274 U. S. 676, 71 L. ed. 1292, 1295. A steam ferry boat engaged in transporting passengers and freight between Astoria, Long Island and New York City across the East River has been held subject to inspection under section 4426. The *Steamboat Sunswick* (D. C. N. Y., 1872), 6 Ben. 112, 23 Fed. Cas. No. 13624.

VIII.

All of the activities of the new ferry will be within the Federal field and the assertion of exclusive jurisdiction by Congress must be given full force and effect.

It sufficiently appears from what has been said that the proposed ferry is subject to the jurisdiction of Congress because (1) it will be used by and operated in connection with an interstate railroad, (2) it will be engaged in a strictly railroad ferry business, (3) it will be engaged in interstate commerce in the general vehicular and passenger phase of its activities, (4) it is an instrumentality of interstate commerce, and (5) it will traverse a navigable water of the United States. Under these circumstances it is subject to Congressional regulation upon every phase of its business. Congress has the right to occupy the whole field if it chooses to do so.

The remaining question is whether Congress has occupied the whole field by appropriate legislation. Under the Act as it stood before 1920, it had assumed complete control to the exclusion of the States, not only over the strictly railroad business of a ferry used by or operated in connection with an interstate railroad, but also over the general vehicular and passenger business of an interstate nature done by such a ferry. *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499. In 1920 the Act was amended by the addition of paragraphs 18 to 20 of section 1. Under paragraph 18 every interstate railroad is prohibited from undertaking an extension

of its line without first obtaining a certificate of public convenience and necessity from the Commission. Paragraph 20 authorizes the Commission to refuse to issue or to issue such certificate and to attach suitable terms and conditions, and then makes the provision, of controlling importance in this case, that the holder of the certificate may *without securing approval other than such certificate* proceed with the construction and operation of the extension. This is plainly the assertion of an exclusive Federal control over a province which has always been entirely within the scope of the Congressional power. This was recognized in *Cleveland, C. C. & St. L. R. Co.* v. *Illinois Com. Com.*, 315 Ill. 461, 146 N. E. 606, 54 A. L. R. 45, in holding that a State Commission has no jurisdiction to permit an extension of an interstate railroad. The Court said:

> "Under paragraphs 18 to 22 of section 1 of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104, as amended Feb. 28, 1920, U. S. C., title 49, section 1), commonly called the Transportation Act, no extension of railway lines can be built, or operation thereon had, without a certificate of convenience and necessity from the Interstate Commerce Commission, and if the construction and connection of this proposed track amount to an extension of a railway line within the meaning of the Transportation Act, the building of such track, and the connection here sought, are matters over which the Illinois Commerce Commission does not have jurisdiction, sole jurisdiction in such matters being vested in the Interstate Commerce Commission."

This Court has never had occasion to consider this precise question. It has, however, in abandonment

cases under the same sections of the Act, held that where a Federal interest is at stake which justifies the occupation of the whole field, exclusive Federal jurisdiction must be sustained. In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 66 L. ed. 566, the Court annulled a certificate of the Commission authorizing the abandonment in both interstate and intrastate commerce of a railroad located wholly within the boundaries of a State, holding that the statute could not be construed as conferring jurisdiction upon the Commission with respect to abandonment in intrastate commerce without raising grave constitutional questions. At the same time the Court pointed out that the intrastate commerce there involved was of no more than local concern, and that it was not as if the road were a branch or extension whose unremunerative operations might burden the main line and, thereby, affect its utility as an artery of interstate commerce.

In the subsequent case of *Colorado* v. *United States*, 271 U. S. 153, 70 L. ed. 878, the Court made it plain that Congress had with some exceptions not here material, intended to take exclusive control wherever there was a Federal interest upon which the statute could operate. The State of Colorado brought suit to enjoin an order of the Commission granting a certificate of public convenience and necessity to an interstate railroad to abandon a part of its line lying wholly within the State because it was an undue burden upon the remainder of the railroad and upon interstate commerce. In upholding the Commission's order, the Court emphasized that Congress had reserved the full authority to determine whether and to what extent

public convenience and necessity permit of abandonment, saying:

> "This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern R. Co.* v. *United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 809. It expressly excluded from Federal control that part of the railroad which consists of 'spur, industrial, team, switching, or side tracks located wholly within one State.' See *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co., supra.* But as to the rest of every railroad line used in interstate commerce Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

If as to the unexcepted portion of each railroad line used in interstate commerce Congress reserved full authority to determine whether and to what extent public convenience and necessity permit of abandonment, it cannot be doubted that it reserved a like authority over extensions of line. This reservation may be inopera-

tive where, as in *State of Texas* v. *Eastern Texas R. R. Co., supra,* there is no field of Federal concern upon which it can operate; but where there is a Federal interest justifying the occupation of the whole field exclusive jurisdiction must be upheld. And that such is the situation here, there can, as we have already shown, be no reasonable doubt.

It is accordingly submitted that there is no doubt as to the authority of the Commission to grant a certificate of public convenience and necessity covering the extension by ferry in this case both for a strictly railroad business and for a general vehicular and passenger business. It is further submitted that the order should be sustained upon this ground.

IX.

Appellant possesses no legal right to maintain this action.

(A) *Appellant had no Franchise at the Time of the Proceedings before the Commission.*

The bill of complaint does not allege that the Ferry Company operated by virtue of any franchise at the time of the proceedings before the Interstate Commerce Commission. Paragraph 5 of the bill (R. 2) alleges:

> "That the plaintiff *is, and for a long period of time has been* engaged in the business of maintaining, operating and conducting a ferry service wholly within the State of Maryland between the City of Annapolis, in Anne Arundel County,

> on the western shore of Maryland, and the town of Claiborne, in Talbot County, and Matapeake Terminal, Queen Annes County, on the eastern shore of said State, operating ferry boats between said points daily and carrying therein passengers and freight for hire. That the plaintiff *operates* said ferry business by virtue of a franchise granted it by the State of Maryland and has expended large sums of money for ferry boats, * * *" (Italics ours.)

The phraseology employed, was it is believed, deliberately chosen and the failure of appellant to allege that it operated by virtue of a franchise at the time of proceedings before the Commission was not due to any inadvertence. The language used must be construed against the pleader. These circumstances are significant in view of the claim now asserted by appellant that the operation of the proposed ferry would be in violation of its legal rights.

There is thus no showing that the appellant had any franchise at all until after the certificate of the Commission was issued, which is too late for present purposes.

A plaintiff has no right of action for the infringement of his ferry franchise where he does not have a clear right or title. *Carter* v. *Garrett*, 13 Ala. 728; *Organ* v. *Memphis Etc. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Norris* v. *Lapsley*, 5 Calif. 47; *Davis* v. *Connolly*, 104 Ky. 87, 46 S. W. 679; *Davis* v. *Connolly*, 21 Ky. L. Rep. 1459; *Butt* v. *Colbert*, 24 Tex. 355; *Higgins* v. *Hogan*, 7 U. C. Q. B. 401; *Londonderry Bridge Comrs.* v. *McKeever*, Ir. L. R., 27 Eq. 464.

(B) *Even If Appellant Has a Franchise, It Is Not Exclusive.*

If the Claiborne-Annapolis Ferry Company had an exclusive franchise to conduct a ferry business in Chesapeake Bay and in the territory to be served by the appellee, then it would have the right to bring an action against anyone who attempted to infringe its franchise, but such, as we have already seen, is not the case. It does not allege in its bill of complaint nor does it anywhere contend that its franchise is so broad. In this country it is well settled since the decision of this Court in the *Warren Bridge Case,* 11 Pet. 420, 9 U. S. L. ed. 773, that in the absence of express provision, a grant by the State of exclusive privileges is not to be inferred. The present Chief Justice in recently commenting on the opinion handed down by Chief Justice Taney in that case said:*

> "While vigorously attacked at the time, the soundness of this principle, and its importance to a developing country, have been generally recognized."

Appellant's franchise, evidently acquired since the commencement of these proceedings, was secured from the State of Maryland (R. 2), and apparently from the Public Service Commission of the State, since that body is the only State tribunal vested with appropriate

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*Address delivered on the unveiling of the bust of Chief Justice Taney, at Frederick, Md., on Saturday, Sept. 26, 1931.

authority. *Bay Bridge Ferry Corp.* v. *Queen Annes County,* 160 Md. 398. The Maryland Commission held in *Re Baltimore and Eastern Shore Ferry Line, Inc.,* P. U. R. 1925 C. 91, that it did not have the power under the law to grant exclusive transportation privileges over the waters of the Chesapeake Bay and its tributaries.

(C) *Even If Appellant Has a Franchise, It Is Not Over the Route or Within the Territory of Proposed Ferry and Would Not be Infringed by Such Ferry.*

The non-exclusive franchise of appellant, apparently acquired during the pendency of these proceedings, is simply for a ferry between Annapolis on the one hand and Claiborne and Matapeake Terminal on the other. This franchise does not cover the whole world, the whole United States, the whole State of Maryland, or the whole of Chesapeake Bay. It is limited to a route between the points mentioned. It does not extend twenty miles down the Bay to Chesapeake Beach where the new ferry is projected for the purpose of serving a different territory and in large part a new traffic and a different set of customers.

Any financial loss that the appellant might suffer would be due to the fact that it now handles a great deal of business from the lower Eastern Shore to the inconvenience and loss of travellers and shippers, who are compelled to use the long and circuitous route that it affords. Under the circumstances the lower shore is not tributary to or in the territory of the appellant's ferry, and the travellers and shippers there are not

its customers in the proper legal sense of the term for present purposes.

The holder of an exclusive franchise may enjoin the establishment of a competing ferry operating over the same route or within a distance prohibited by statute or, by some authorities, within a reasonably close distance, where the effect is to take away a part of the patronage to which it is entitled. *Sistersville Ferry Co.* v. *Russell,* 52 W. Va. 356, 59 L. R. A. 513 (annotated), 43 S. E. 107, *Hammerton* v. *Dysart,* 1916 A. C. 57, Ann. Cas. 1916 B, 1174 (annotated). There is a division of authority as to whether the holder of a non-exclusive franchise possesses the same right, 25 *Corpus Juris* 1067.

But it is settled that the establishment and operation of a ferry to accommodate a new and different traffic or a different territory from that served by the older ferry is not an infringement of the older ferry's privilege, whether it be exclusive or non-exclusive. This rule has its foundation in the paramount public interest which must be controlling in all cases of this kind and rises above the desire for profit of the franchise holders.

In *Gales* v. *Anderson,* 13 Ill. 413, the complainants sought to enjoin the defendants' operation of a ferry across the Mississippi River within a quarter of a mile of the complainants' ferry which had been previously established under an exclusive franchise. The complainants' franchise had given them a right to establish a landing on the Illinois side of the river within two points three miles apart, and the defendants' ferry was within these limits. The Court held that the com-

plainants' landing did not extend for the whole three miles, but was confined to the actual landing place once it was selected. It held that the franchise was exclusive only over the route between the two termini and was not infringed by a second ferry operating between other points. Justice Caton said at page 424 in delivering the opinion of the Court:

> "The defendants have selected and occupied their landing about a quarter of a mile below that of the complainants, upon or near the township line, landing temporarily at other points, when compelled to abandon their ordinary landing in consequence of high water. With this evidence before us, we cannot doubt as to the location of these two ferries, and the exclusive rights of each are confined to the ferries thus located and used. Should we hold that the complainants' ferry ways extend the whole three miles, as was contended on the argument, we might impose a burden upon them which would render their franchise valueless. If their ferry ways extend this whole distance, then they must be at all times ready to transport all passengers who present themselves within that distance, for they are bound to be prepared to transport all who present themselves on their ferry ways. But admit that their obligations would not be so extensive, still they are certainly bound to afford reasonable accommodations to the travelling public seeking to cross the river at their ferry. There may be, and indeed the evidence shows that there are, several important thoroughfares terminating upon the river within the distance which the complainants claim as their exclusive ferry landing. Shall

> they run a boat to each of these points? If they have the exclusive privilege claimed, they are certainly bound to do so; and then they have two ferries instead of one, when the order certainly establishes but one ferry."

In *Taylor* v. *Wilmington and Manchester R. R. Co.*, 49 N. C. 277, the plaintiff was the holder of an exclusive franchise for a ferry from Wilmington to Eagles Island and from Eagles Island to the further shore of the Cape Fear River. The two ferries were connected by a highway across the island which the ferryman was required to maintain in consideration for his exclusive franchise. The defendant railroad operated a boat from Wilmington to a point on the island at some distance from the ferry landing, carrying persons who either were or pretended to be on railroad business. The plaintiff brought an action on the case for damages for the violation of his franchise. The Court held that he was without a cause of action because the persons carried were not customers of the regular ferry. The Court said:

> "The defendants' depot is on the island, some little distance from the road, and 'the landing place' of the plaintiff. The persons transported by the defendants from Wilmington to the island, did not wish to cross over the island, or to use the road, or to go to the plaintiff's landing; they wished to go to the defendants' depot; but for it, they had no business, or desire to go to the island, and their going was without reference to the plaintiff's ferry, or the road; so they were not his customers.
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> * * * * * * *

"It is unnecessary to consider the fact that, for fifty years—ever since the island has been used for ricefields, or other purposes—every person has been crossing over the river from Wilmington to the place on the island where his business called him without objection on the part of the plaintiff, or those under whom he claims; we have seen they have a perfect right to do so; they were not his customers. So the learning about 'prescription' and 'dedication' has no bearing. It is also unnecessary to consider the effect of the exception in the deed of the defendants, for as the plaintiff has no cause of action without reference to the exception, that cannot give him one."

In *Hammerton* v. *Dysart* (1916), A. C. 57, Ann. Cas. 1916 B 1174 (annotated), plaintiffs sought a perpetual injunction restricting the defendants from infringing upon their ferry. The ferry of defendants was slightly over a quarter of a mile distant from the older one but served a different neighborhood and was in respect of a new traffic occasioned by the creation of a new public park on the opposite side of the Thames. The trial court held that the ferry set up by the defendants in no way disturbed the old ferry and dismissed the action. The Court of Appeals by a divided bench reversed the decision, and an appeal was taken to the House of Lords, where the Court of Appeals was reversed.

Viscount Haldane held that the plaintiffs had an exclusive ferry, but only within reasonable limits. He pointed out that much of the new traffic was naturally tributary to the defendants' ferry, although some of

it would go around by the old ferry if the more direct route were not in existence. In proceeding to hold that no right of the defendants was violated by setting up a ferry to handle new traffic and serve a different territory, he stated:

> "No doubt abstraction of traffic which would otherwise yield tolls to the owner of a franchise ferry, is a proximate ground of action for disturbance of the franchise. But if the abstraction be effected, not by carrying in the line of ferry, but at a distance, to what must this distance be limited? Surely it must be measured by some right. For the franchise is to take tolls for carrying from point to point or vill to vill only. Merely to carry between other places, even if traffic between the termini prescribed by the franchise is thereby deflected is accordingly no wrong unless some substantive right is also conferred to exclude rival carriage within ascertainable limits. These limits must depend on the right, for to carry outside the line of the ferry can be no wrong, unless some right is violated, and it must be on some such right that the protection of the tolls depends. If it be otherwise, I do not see why abstracting tolls by building a bridge close to the ferry should not be a wrong, and yet it has been decided that it is not actionable. In other words the loss of tolls cannot give rise to the right; it is the right which must be the foundation of the claim for the loss of tolls.
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> "But he, a ferryman, has a right of another kind. He is entitled to a monopoly of his line of

ferry, and he has a cause of action against anyone who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. The other line may be such that the circumstances render it in the main little more than a competitive route for those who would naturally proceed by the old ferry. If so, there is a cause of action for disturbance against anyone who abstracts passengers by setting up the second ferry. But if the new ferry is not of this kind, but is set up in order to carry, not those who desire to follow the old line, but another class consisting of those who wish to go to places which have become frequented and are really and not only colorably different from the old termini and the highways which end in them, they cannot be debarred from using it, and so be indirectly compelled to travel out of their way."

Two cases were cited in *Hammerton* v. *Dysart*, *supra*, involving substantially the same situation, *Newton* v. *Cubitt*, 12 C. B. N. S. 32, 104 E. C. L. 32; and *Tripp* v. *Frank*, 4 T. R. (Eng.) 666. In the former case the Court said:

"The principles by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer, that, if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue

the line of those ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh, would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such laborers pass now to Greenwich where one traveller passed in 1800, it seems oppressive to fix on such a large number of laborers the perpetually repeated loss of three-quarters of a mile of walking, for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable."

In the second case, *Tripp* v. *Frank*, 4 T. R. (Eng.) 666, it was said:

"It seems to me that the evidence does not support his action. If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colorably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them. It is now admitted that the ferryman cannot be compelled to carry passengers to any other

place than Barton; then his right must be commensurate with his duty.'"

The case at bar is a much more aggravated one than any of those cited. The proposed ferry is much farther away than in any of them. It much more clearly is projected to serve a distinctly different territory than was the case in the decisions relied upon. Its customers are not those which the older ferry can legitimately claim as its own. Just as in *Hammerton* v. *Dysart, supra*, the new ferry is designed to serve a new traffic and other highways, as sufficiently appears from our discussion of this subject in connection with our consideration of the evidence bearing on the need for a general vehicular and passenger ferry at Chesapeake Beach. It is clear that the appellant has no right of action under established principles of law.

(D) *Appellant is a Mere Competitor with Some Prospect of Financial Loss from the Operation of the New Ferry, and as such has no Right to Maintain the Present Action.*

It has already been shown that the appellant has no right to enjoin the construction and operation of the new ferry as an infringement of its franchise. Any right of this nature that it may have is wholly dependent upon what it is entitled to as a mere competitor who will suffer some financial disadvantage. This Court has decided that these circumstances are not sufficient to create a right of action. In *New Orleans M. & T. R. R. Co.* v. *Ellerman*, 105 U. S. 166, 173, 26 L. ed. 1015, 1017, it refused to allow a suit by a competi-

tor to enjoin a railroad company against the operation of a wharf, saying:

> "The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damaged him, the answer is that it does not abridge or impair any such right."

The rule is the same in suits brought to enjoin orders of the Interstate Commerce Commission. Such suits are covered by the Commerce Court Act of June 18, 1910 (36 Stat. 539), and the District Court Jurisdiction Act of October 22, 1913 (38 Stat. 218). The latter statute abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. Neither of the statutes define the class of persons who may bring suits to enjoin an order.

As an intervener before the Commission, appellant is entitled under Section 212 of the Judicial Code to intervene in court, but this does not mean that it is entitled to maintain a suit in its own right. This distinction was clearly drawn in *Alexander Sprunt & Son, Inc., et al.* v. *United States et al.*, 281 U. S. 249, 74 L. ed. 832, where the plaintiffs had intervened before the Commission in a case brought by other shippers, attacking a differential in rates enjoyed by the plaintiffs. The Commission issued an order requiring the carriers to eliminate the differential, whereupon plaintiffs brought suit to enjoin the order. In holding that the lower court had properly dismissed the bill, the Court said:

> "We are of opinion that appellants have no standing, in their own right, to make this attack. Insofar as the order directed elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per 100 pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission, under Section 3 of the Interstate Commeree Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding, and if they did so, they became entitled under Section 212 of the Judicial Code to intervene as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

Appellant asserts that in the *Sprunt case* no complaint was made that the order was invalid because of want of authority in the Commission to make it, but the complaint was based solely upon the fact that the adjustment caused a financial loss. This is not our understanding of the issues in that case, which is headed as follows (74 U. S. L. Ed. 832):

> "Appeal from the United States District Court for the Southern District of Texas to *review a decree sustaining the validity of an order of the Interstate Commerce Commission* requiring certain railroads to remove in a manner pre-

scribed the undue prejudice and preference caused by their rates on cotton shipped from interior points to ports on the Gulf of Mexico." (Italics ours.)

The appellants there contended that there was no evidence to support the Commission's findings of undue preference and undue prejudice as between the appellants and the interior merchants. They contended further that even if the Commission's findings of undue prejudice and undue preference were valid and even if an equalization of rates were warranted, *the Commission would still be without jurisdiction* to raise the rates paid by the appellants. Quite plainly the validity of the order was in issue as well as the jurisdiction of the Commission to make it.

In *Edward Hines Yellow Pine Trustees* v. *United States et al.*, 263 U. S. 143, 68 L. Ed. 216, lumber manufacturers and dealers brought suit to set aside as void an order of the Interstate Commerce Commission requiring carriers to cease and desist from collecting a penalty charge of ten dollars per day on lumber held at reconsignment points, an order which gave a competitive advantage to rival dealers. In holding that the bill could not be maintained, the Court said:

"But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges, and, but for the prohibition contained in the order, would

> do so. For aught that appears, carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap heretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges."

In both the *Sprunt* and *Hines cases,* the power of the Commission to make the orders under attack, and hence their validity, was challenged. This Court, however, refused to consider the validity or invalidity of the orders because of the absence of a right of action in the plaintiffs. The validity or the invalidity of the order and the power or jurisdiction of the Commission to make it is immaterial unless it appears that the appellant has a right to maintain the present suit.

In a suit like the present one to enjoin an order of the Commission granting a certificate of public convenience and necessity, authorizing the construction of an extension of a line of railroad, *Pennsylvania Railroad Company* v. *United States et al.*, 4 F. (2d) 291, the right of the plaintiff to maintain the action was denied. In that case the Pittsburgh and West Virginia Railroad Company had applied for authority to extend its line into Donora, Pennsylvania, where the Pennsylvania Railroad had for some time enjoyed a monopoly of the business. The latter intervened in the proceeding before the Commission in opposition to the application, and after the certificate was awarded brought its bill to enjoin the action. In denying its right to maintain the suit, the Court said:

"Being threatened by the Pittsburgh & West Virginia Railway Company through its proposed extension, with competition for traffic in the Donora district, the Pennsylvania Railroad Company undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard. It did intervene and was heard, but that interest alone did not give it a right to maintain an independent suit to set aside the Commission's order. Such a suit can be brought and maintained by a competitor only where some right of its own has been violated by the order. *Sprunt & Son. Inc.*, v. *United States*, 50 S .Ct. 315, 74 L. ed., 832, decided April 14, 1930. True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right —a privilege being enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trademark to the first adopter."

The appellant cites *Chicago Junction Case*, 264 U. S. 258, 68 L. ed. 667, in support of its right to maintain this action because the plaintiff was there, as here, a party to the proceeding before the Commission. It also cites *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557,

63 L. ed. 772, as holding that wherever one suffers financial loss from a void order of the Commission, he can maintain an action for injunction, but this Court held in *Alexander Sprunt & Sons, Inc., et al.* v. *U. S. et al.*, 281 U. S. 249, 74 L. ed. 832, that such a broad construction of those cases was not justified, saying at page 256:

> "Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, 147, 148, 68 L. ed. 216, 220, 221, 44 Sup. Ct. Rep. 72, and *United States* v. *Merchants & Mfrs. Traffic Asso.*, 242 U. S. 178, 188, 61 L. ed. 233, 239, 37 Sup. Ct. Rep. 24. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Hubbard*, 266 U. S. 474, 69 L. ed. 389, 45 Sup. Ct. Rep. 160; *Chicago Junction Case*, 264 U. S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 63 L. ed. 772, 39 Sup. Ct. Rep. 375; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22. In each of those cases an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

In a note to the passage from the opinion quoted above, the Court said:

"Two suits were involved in the Diffenbaugh Case. One was against a carrier to recover allowances for substituted transportation facilities alleged to be due under Section 15 of the act. The Interstate Commerce Commission was joined and its order prohibiting the allowances sought to be enjoined because the order would otherwise have constituted a defense to the suit. In the other action, interested carriers intervened as parties plaintiff and persisted in their effort to set aside the order. In *Skinner & E. Corp.* v. *United States,* the right under the last paragraph of Section 4 of the act, not to pay increased rates except when due to reasons other than the elimination of water competition, was clearly the right of the shipper. In the *Chicago Junction Case,* the order violated the plaintiff's right under Paragraph 2 of Section 5 to equal treatment; and the plaintiff, with those similarly situated, was the only person in interest against the order. In the *Hubbard Case,* the challenged order increasing rates was alleged to violate a contract between the plaintiff and the carrier, who, it was alleged, was not subject to the jurisdiction of the Commission."

It might also be added that in the *Chicago Junction Case* the New York Central was alleged to have violated the rights of the Baltimore and Ohio and its other connections under Section 3 (*c*) of the Act, which reads as follows:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper,

> and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Chesapeake and Ohio Railway Co. v. *United States*, 283 U. S. 35, 75 L. ed. 824, also cited by appellant, is scarcely an authority in its favor in view of the fact that the right of the plaintiff there to bring the suit was not even considered by the Court, as appellant admits. This Court had jurisdiction of the subject matter and its decree affirming the judgment of the court below dismissing the bill is not tantamount to a decision that the appellant there, who was plaintiff below, had a valid cause of action, even though the affirmation was based upon a consideration of the merits. Moreover, the case is distinguishable from the one at bar in essential particulars. It involved new railroad construction in a general territory served by the far-flung lines of the Chesapeake & Ohio, Norfolk and Western, and Virginian railroads. The rights of those carriers in their territories is far from being the same as the right of the Claiborne-Annapolis Ferry Company, a water line of very restricted operation, in a territory not its own.

Western Pacific California R. R. Co. v. *Southern Pacific R. R.*, 76 U. S. L. ed. 120, 52 Sup. Ct. Rep. 56,

decided November 23, 1931, was controlled by the provisions of section 1 (20) of the Act, which are in part to the following effect:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this Section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected or any party in interest."

The extensions prohibited in section 1 (18-20) are confined to those undertaken without a certificate from the Commission. The manifest purpose was to prevent anyone from flouting its authority by beginning construction or operation without its consent. The sole purpose of the law was to make provisions to insure that no future extensions should be made without the approval of the Commission, and the extension of the right to sue to "any party in interest" had as its sole object the protection of the exclusive control of the Commission over the situation by encouraging outside parties to come to its assistance, especially in cases which might otherwise escape its attention. Apart from this, there is not the slightest indication of an intention on the part of Congress to multiply causes of action by creating ones which did not exist before. Had it been the intention to subject to judicial review all of the acts of the Commission under the newly delegated powers, it is reasonable to suppose that clear and express language would have been used.

In the case just cited the Southern Pacific began an extension of its line without seeking a certificate of authorization from the Commission. It is thus to be distinguished from the instant case where a certificate has been sought and obtained, and where the intervention of no third party is needed to protect the jurisdiction of the Commission.

In short there is in the instant case no violation actual or threatened of any right of the appellant derived from general principles of law, or of any statutory right. Appellant has reached a contrary result by a wholly unwaranted interpretation of the cases arising under the act. It has found cases in which a right of action was upheld where the plaintiff was in danger of financial loss, and then jumped to the wholly unjustified conclusion that, by virtue of this fact alone, a suit might be maintained. The appellant failed to apply the real test laid down by this Court in *Alexander Sprunt & Sons, Inc., et al.* v. *U. S. et al.*, 281 U. S. 249, 74 L. ed. 832, namely, whether there was, in the cases cited, violation of an existing legal right coupled with monetary loss. This deficiency destroys the usefulness of the analysis made in the opposing brief. It is undoubted that where the Commission's order is valid, but will result in financial loss to the plaintiff, no action can be maintained. It is also undoubted that where the order is void, but where no legal damage will result to plaintiff, no action can be maintained. But neither can an action be maintained where the order is void and plaintiff will suffer financial loss therefrom, unless a legal right has been vio-

lated. The order of the Commission meant financial loss to the plaintiffs in the Sprunt case and in the Hines case. The orders may have been void for all that was determined by the court. But the court refused to decide the question because the plaintiffs had no right to raise it in either of those cases, just as the Ferry Company has no right to raise it here.

X.

Appellant is not entitled to equitable relief for protection of present excessive and illegal profits.

In the section of this brief dealing with the evidence relative to a general vehicular and passenger ferry it was conclusively shown that, based on an estimate which appellant describes as overexaggerated, the business which the new ferry will take away from it will in no event reduce its earnings below 7 per cent. The evidence shows affirmatively, however, that the rate of return which it would enjoy with the new ferry in operation would be much larger.

The appellant, conducting a ferry business which is affected with a public interest and subject to governmental regulation of profits, is entitled to a fair return upon the value of the property devoted to the public service. But it is entitled to nothing more. It has no legal right to large speculative profits over and above what is necessary to produce the required earnings. In *Smyth* v. *Ames*, 169 U. S. 466, 547, this Court held:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand,

what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The same question was considered at length in the later case of *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 466, 68 L. ed. 456, where the Court said:

"The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit."

* * * * * * *

"It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the

sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair."

The Company is entitled to a fair return and no more. This Court upheld a rate of return of 6 per cent in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Stanislaus County* v. *San Joaquin & Kings River C. & I. Co.*, 192 U. S. 201; and *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655. A rate of 7 per cent was sanctioned in *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 419, 420, while 7¼ per cent was held free from confiscation in *Georgia Ry. & Power Co.* v. *Railroad Commission*, 262 U. S. 625. What is a fair rate of return depends of course upon the circumstances surrounding the individual case, but such a return is rarely in excess of 7 per cent.

What the appellant is seeking to protect here is its huge monopolistic profits running in recent years as high as 37 per cent. It will receive not only a fair return but a very liberal one, even with the new ferry operating, and it has no right to the excessive profits now enjoyed over and above that amount, for whose protection it may resort to a court of equity. A decree cannot properly be entered to secure to the appellant the continued enjoyment of these excessive and illegal gains.

XI.

The operation of the proposed ferry is within the charter powers of the railway company.

The charter of its predecessor in title, the Washington and Chesapeake Beach Railway Company, to which

the defendant has succeeded by a series of mesne conveyances, is very broad and confers full power for engaging in the construction and operation of a ferry.

By Section 4 of the said charter, the company was authorized to locate and operate a continuous line of railway from the District of Columbia to Chesapeake Bay

> "with the privilege of constructing such docks, piers, bridges and retaining walls along the bay shore, as may be necessary" (R. 161).

Section 6 provided that it might also

> "purchase, hold, own, sell, lease or otherwise dispose of such lands and premises at the terminal at Chesapeake Bay as may be essential for the establishment at the said terminal of a permanent seaside resort not exceeding in the aggregate 3,000 acres" (R. 161).

By Section 11 the president and directors of the company were

> "invested with all the rights and powers necessary to the construction, working, use and repair of its said railroad, with such branches at any point of said railroad not exceeding twenty miles in length, as the said president and directors may determine" (R. 162);
>
> * * * * * * *
>
> "make or cause to be made, lateral railways in any direction from the said railroad" (R. 163),
>
> * * * * * * *
>
> "and may also own and employ steamboats or other vessels to connect the said railroad or rail-

roads with other points by water communication (R. 163).

The laws of Maryland, Article 23, Section 312, provide that

> "Any railroad company incorporated under the laws of this State may own and operate any line of steamships or steamboats, or may subscribe to or hold the stock of any company owning and operating such steamships or steamboats, where such steamships and steamboats can be used wholly *or in part* in connection with the business of said railroad company." (Italics ours).

The language of the charter taken in conjunction with the provision of the Maryland statute could hardly be more broad and comprehensive. The words "steamboat" and "vessel" are generic terms and include ferry boats and boats of all descriptions. The word "vessel" as applied to maritime affairs, is understood to mean any vehicle used for transportation on the water. *United States* v. *Open Boat* (U. S.) 27 Fed. Cas. 346, 352. It has been held in New York that a ferry boat is a "vessel" within the meaning of Laws 1862, c. 482, as amended by Laws 1863, c. 422, providing that, whenever a debt shall be contracted by the builder of a vessel on account of work done or materials furnished, said debt shall be a lien on such vessel, *Phoenix Iron Co.* v. *Hopatcong*, 27 N. E. 841, 844, 127 N. Y. 206.

If the legislature of Maryland had intended the use of boats by the new company to be confined to a strictly railroad ferry, it is reasonable to suppose that it would have employed definite and precise language to that end. But it did not do so. It left the company free to employ any kind of steamboats or other vessels. It could establish a regular line of steamships carrying freight or passengers or both. Such a steamship line is customarily open to the patronage of the general public, and there is no reason to suppose that the legislature intended to confine the patronage of any such enterprise established by the railroad company to persons and property moving between other points over its rail lines. In fact, the Maryland statute already quoted, authorizes steamships and steamboats to be used wholly *or in part* in connection with the railroad business, indicating a public policy of the State favoring rather than prohibiting the extension of auxiliary service into the non-railroad field. Since a ferry is simply one kind of a steamship, steamboat or vessel, and a kind frequently used by and operated in connection with railroads, it is clear that the legislature intended by the general charter provisions to authorize the company to engage in any sort of water transportation including ferry service, of both a railroad and a general vehicular and passenger nature, that might be necessary or appropriate in the service of the public.

The soundness of this conclusion is particularly manifest when the limited territory within which the Railway Company was intended to operate is considered. It was not projected to run hundreds or thousands of

miles with a far-flung business that might require the auxiliary service of boats in the coast-wise trade covering long distances or even engaged in foreign commerce. Its activities were to be confined by reason of its geographic location to a more or less circumscribed portion of the District of Columbia and Maryland. The water carriage naturally appertaining to a railroad venture of this sort would be largely in connection with local transportation up and down Chesapeake Bay, the only navigable water, with one unimportant exception, reached by the line. Any water transportation in which the Railway Company might engage, therefore, might reasonably be expected to include ferry service.

The Maryland Public Service Commission has held that a charter authorizing a company to operate steamboats and to carry goods includes authority to transport automobiles and their contents, even where such transportation is in the nature of a ferry service. In *Re Baltimore and Eastern Shore Ferry Line, Inc.*, P. U. R. 1925 C. 91, the Commission had before it an application filed by the Baltimore and Eastern Shore Ferry Line for an order restricting the operation of a ferry by the Tolchester Beach Improvement Company between Baltimore and Tolchester Beach, Kent County, Maryland. One of the questions was whether the clause in the company's charter authorizing it to transport goods included the carrying of automobiles and their contents. The Commission dismissed the application saying:

> "It appears that the Tolchester Company has been operating a line of steamboats between

Baltimore and Tolchester, and other points on the Chesapeake Bay and its tributaries for a long term of years, this company's operations being under the authority of a charter granted by the legislature before the Public Service Commission Law was enacted. The company has been conveying passengers and freight ever since it began operations. The goods carried have been of a varied character and have included livestock and vehicles. It has also carried automobiles, and the uncontradicted statement was made at the hearing that the automobiles of the officials of the Baltimore & Eastern Shore Ferry Company were carried to and from Tolchester on the occasion when the ferry company officials made their inspection of the territory in the neighborhood of Rock Hall for the purpose of selecting a terminal for their ferry operation.

"It developed that the Tolchester Company had remodeled certain of its vessels for the purpose of catering more extensively to the business of carrying automobiles and their contents between Baltimore and Tolchester Beach.

"Three issues were raised in this case.

"First, whether the clause in the company's charter authorizing it to transport 'goods' includes the carrying of automobiles and their contents.

"Second, whether the carrying of automobiles and their contents, changes the character of the Tolchester Company's business and makes it a ferry company.

"Third, whether this Commission, under the law, has the power to limit the operations of vessels over the waters of the Chesapeake Bay

and its tributaries or grant any transportation privilege over those waters.

"The findings of the Commission in these matters are as follows:

"That the charter of the Tolchester Company does not prevent it from transporting automobiles and their contents.

"Second, that the transporting of automobiles and their contents does not change the general character of the business which the Tolchester Company has been doing.

"Third, that the Commission has not the power under the law to grant exclusive transportation privileges over the waters of the Chesapeake Bay and its tributaries."

The facts recited by the Maryland Commission plainly show that the Tolchester Company was engaged in a ferry business, and its holding is to the effect that a vehicular ferry business is not so foreign to the transportation of goods by water as to constitute a change in the general character of business previously done by a boat line. On the same theory, the Chesapeake Beach Railway Company would not diverge from the general character of the business authorized by its charter which included the employment of steamboats or other ferries, by engaging in a vehicular ferry business.

By what has just been said it is not meant to put forth the contention that the legislature gave the railroad in its charter a franchise to operate a ferry at Chesapeake Beach or at any particular point, as distinct from the general power to operate a ferry at some location for which it might acquire a franchise,

or what is the same thing, a certificate of public convenience and necessity.

General charter powers are one thing, and the possession of a specific franchise, quite another. The failure to observe this distinction has led the appellant to cite several cases, *Fitch* v. *New Haven and Etc., Ry. Co.*, 30 Conn. 38; *The Maverick*, 16 Fed. Case (No. 9316) 1186; *Chesapeake Ferry Co.* v. *Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561, as showing that the language used in the railway company's charter is not sufficient to convey power to engage in a general ferry business, when in reality they hold only that the particular railroads under consideration did not possess specific ferry franchises where they were operating enterprises of that kind.

Charter powers are of three classes (1) the right to organize and exist, (2) the right to act generally and (3) the special privileges which are not possessed by individuals under general laws, 7 R. C. L. 88. *Detroit Citizens Street R. Co.* v. *Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809, *Eastern Products Corporation* v. *Tennessee Coal I. & R. Co.*, 151 Tenn. 239, 269 S. W. 4, 40 A. L. R. 1483, 1493.

It is the privilege of doing that which does not belong to the citizens of the country generally by common right, that constitutes the distinguishing feature of a franchise, 12 R. C. L. 174, *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 U. S. L. ed. 274; *Peoples R. Co.* v. *Memphis R. Co.*, 10 Wall. 38, 19 U. S. L. ed. 844; *New Orleans Gas Light Co.* v. *Louisiana Light, Etc., Manufacturing Co.*, 115 U. S. 650, 29 L. ed. 516. The right to keep a public ferry is a franchise of the

third class mentioned above; and cannot be exercised by an individual or a corporation without license or legislative grant, either mediate or immediate, 11 R. C. L. 914; *Mills* v. *St. Paul County,* 8 How. 569, 12 U. S. L. ed. 1201; *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 29 L. ed. 158.

The term "franchise" used in this sense was defined by this Court in *California* v. *Central P. R. Co.,* 127 U. S. 40, 41; 32 L. ed. 157, 158, as follows:

> "A franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure but should be reserved for public control and administration either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security * * * No private person can establish a public highway or a public ferry or railroad or charge toll for the use of the same without authority from the legislature direct or derived. These are franchises * * * The list might be continued indefinitely."

A franchise in this sense of the term falling in the third group of the classification of powers just referred to, was not, even before the days of modern public service commission laws, always included in the corporate charter of public service corporations. A company might be given by its charter the right of corporate existence and the right to conduct a ferry business. It would then have charter powers of the

first and second classes, that is, the right to organize and exist, and the right to act generally, but it would still be without the power to conduct a ferry at a particular location. This precise question was the point in issue in *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120, where the court said:

> "It becomes important, then, to inquire by what right the appellee claims a ferry privilege. The Court properly found that it had not shown a right by prescription. It is claimed however, that by virtue of its incorporation under the general laws of the state, with power to operate a ferry between Eagle Pass and Piedras Negras, it acquired the right to exercise the ferry privileges claimed by it. But we think this claim is based upon a misapprehension of the scope and effect of our general incorporation laws. Their object is simply to enable individuals to associate themselves together, with the powers, privileges, and incidents of a corporation for the promotion of certain purposes. So far as they relate to ferries, they merely provide a mode by which a corporation may be created for the purpose of maintaining a public ferry. The franchise they grant is the power, as a corporation, by acquiring another franchise, namely, a ferry privilege, to operate and maintain a public ferry. After the incorporation is completed, the corporation has the same right to acquire a ferry property and privilege, and no more. It was certainly not intended to enable any number of individuals, by the mere fact of filing articles of incorporation as required by the statute, to acquire a ferry privi-

lege itself at any point that should be designated in such articles."

Each of the cases cited by appellant was concerned with the existence of the third class of powers; that is, it was concerned with the question whether the legislature had given a franchise for a general ferry at the particular location where it was being operated. Since the asserted right to operate in each case arose before the advent of the modern system of laws governing the powers and franchises of public service corporations, the corporate charter was invoked as a sole repository of all powers and franchises, and the answer given by reference to its terms. This third class of franchises is now commonly granted, not as formerly, in the charter of incorporation, but by means of a certificate of public convenience and necessity such as is provided for by section 1 (18-20) of the Interstate Commerce Act, and by the Public Service Commission Law of Maryland. *Bay Bridge Ferry Corporation* v. *Queen Annes County*, 160 Md. 398.

The question in the instant case is not, as in the cases cited by appellant, whether both general powers, and also a special franchise, are found in the charter. It is rather whether the Railway Company has authority to construct and operate a ferry at Chesapeake Beach by reason of its charter powers, reinforced by the franchise given by the certificate of public convenience and necessity of the Interstate Commerce Commission. In this view the authority is ample.

Moreover, even if the Railway Company had merely the authority to conduct railroad business without the aid of the further powers which are in fact contained

in its charter, it would still, as the lower court correctly held, be fully authorized to engage in the operation of a ferry in connection with its railroad business. Charter authority to conduct a railroad business gives authority to conduct those activities which are ordinarily engaged in by railroad companies. The operation of a ferry in connection with its line comes within this class of activities, as is shown by the definition in Section 1 of the Interstate Commerce Act of the term "railroad" as including, among other things, "a ferry used by or operated in connection with any railroad."

XII.

The question of ultra vires cannot be raised by appellant.

Whatever may be the charter power of the railroad in connection with the operation of a ferry, the question of *ultra vires* is not one that can be raised by appellant. Where a corporation acts beyond its charter power the proper remedy is a direct proceeding by the State, and private individuals have no right to set the matter up collaterally.

Cleveland C. C. & St. L. R. Co. v. *U. S.*, 275 U. S. 404, 72 L. ed. 338.

Blair v. *Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801.

Fritts v. *Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. ed. 317.

Union Natl. Bank v. *Matthews*, 98 U. S. 621, 25 L. ed. 188.

Ohio, etc., R. Co. v. *McCarthy*, 96 U. S. 258, 24 L. ed. 693.

In *Camblos* v. *Philadelphia and R. R. Co.*, Brewst. (Pa.) 563, Fed. Cas. 2331, the Court held that an appropriation by a railroad company of the profit of a business of which an express company before had the monopoly does not thereby incur any liability to the express company nor give the latter the right to call the railroad company to account on the ground that the power to conduct such business was not conferred by the railroad company charter.

In *New England R. Co.* v. *Central R. & Electric Co.*, 69 Conn. 56, 36 Atl. 1061, injurious competition alone was held not to give a railroad company the right to contest the power of a street car company to extend its line so as to parallel the line of the railroad company, without first having obtained an order of public convenience and necessity, on the ground that the act of the street car company in building its line without such order was *ultra vires.*

In *Burns* v. *St. Paul Street R. Co.*, 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757, the plaintiff sought to enjoin as *ultra vires* the placing by the defendant street railway company of advertisements inside its cars. The Court held that the plaintiff had no right to bring such an action because the case was not one where a court of equity could interfere, not only upon the information of the Attorney General, but also upon the information of private parties directly affected.

In *New Orleans, M. & T. R. R. Co.* v. *Ellerman*, 105 U. S. 166, 173, 26 L. ed. 1015, 1017, the Court, in directing the dismissal of a bill brought by a competitor to enjoin a railroad company from the operation of a wharf, said:

"The legal interest which qualifies a complainant other than the State itself to sue, in such a case, is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the Company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the Railroad Company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the Railroad Company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The Company is not shown to owe him any duty which it has not performed."

In *Cleveland, etc., Ry. Co. v. United States,* 275 U. S. 404, 72 L. ed. 338, the planitiff sought to set aside, under the Urgent Deficiencies Act, an order of the Commission requiring a railroad to make connection with a switch track leading to an adjacent coal mine. It was contended by the plaintiff that the operation of the switch track by the mining company was *ultra*

vires, and that therefore, the Commission's order requiring of the railroad connection with and switching operations over the tracks to the mine, was illegal, and should be set aside under the statute. In denying this contention and sustaining the Commission's order the Supreme Court said:

> "The argument is that under the law of Illinois only a public track may cross a highway; that an Illinois mining corporation has no power to build a public track; that since the coal company is an Illinois corporation the construction of the track was *ultra vires;* that hence, whether the track be public or private, it is an illegal structure and that consequently it is not a track 'which may be constructed' within the meaning of paragraph 9. Congress obviously did not impose upon the Interstate Commerce Commission the duty of determining, before issuing an order, whether or not a private track actually in existence had been constructed by the shipper *ultra vires.* Whether in so acting the shipper transgressed powers conferred upon it by the state is a question which cannot be raised in this suit. If the state concludes to question the legality of the shipper's acts, it must do so in a direct proceeding instituted by it for that purpose. *Kerfoot* v. *Farmers & M. Bank,* 218 U. S. 281, 287, 57 L. ed. 1042."

Pittsburgh & West Virginia Railway Co. v. *United States,* 281 U. S. 479, 74 L. ed. 980, 984, was an action under the Urgent Deficiencies Act to set aside an order of the Commission granting permission to the Wheeling & Lake Erie Railway Company to join with other railroads in establishing and using the union station

and terminals at Cleveland, Ohio, under an arrangement submitted to and approved by the Commission as being for the convenience and necessity of the public. One of the grounds upon which the court was asked to set aside and annul the Commission's certificate and to enjoin the Wheeling from participating in the arrangement, was that the things which the Wheeling proposed to do in carrying out the plans were *ultra vires* of the Wheeling's charter. Upon this point this Court said:

> "Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare *Cleveland, C. C. & St. L. R. Co.* v. *United States,* 275 U. S. 404, 414, 72 L. ed. 338, 344; *Great Northern R. Co.* v. *United States,* 277 U. S. 172, 181, 72 L. ed. 838, 841. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike the Chicago Junction Case (*Baltimore & Ohio R. Co.* v.

United States), 264 U. S. 258, 269, 68 L. ed. 667, 676) where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here, such joinder is unnecessary for that purpose."

Both of the two last cases cited arose under the Interstate Commerce Act and show that the same rule as obtains generally applies in respect to the administration of its provisions. The question of *ultra vires* cannot be raised collaterally in a proceeding like the case at bar. Even if, as we deny, the Chesapeake Beach Railway Company exceeds its charter power by engaging in the operation of a ferry, whether it be a general ferry or a railroad ferry, the question cannot be raised by one who is merely a competitor, like the appellant.

CONCLUSION.

The Railway Company now suffers from a lack of traffic due to competition with other agencies of transportation and the small productivity of the local area which it serves. Just across the bay from its eastern terminus at Chesapeake Beach is a rich and productive country suffering from an inadequacy of transportation facilities. Its projected extension will serve the dual purpose of improving its financial strength and of furnishing a needed public service. It applied to the Commission for a certificate of public con-

venience and necessity authorizing a combination railroad and general vehicular and passenger ferry across to the Eastern Shore. It submitted at the hearing before the Commission not only substantial but convincing evidence on each of those two branches of the case. Its application and its evidence were accepted by the Commission as made in good faith and as trustworthy. These findings are conclusive since they are based on substantial evidence.

Combination railroad and general and vehicular ferries are within the exclusive jurisdiction of the Commission in respect to their interstate business, and the decision in *New York Central and H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, is controlling on this point. The proposed ferry will be engaged in interstate commerce in both departments of activity. The order is valid even though construed as authorizing a strictly railroad ferry, and even on that basis it is supported by substantial and convincing evidence.

There is no issue in this case concerning any attempted evasion of the jurisdiction of the State of Maryland. The State authorities for that reason are taking no part in this suit, although they suggest that they may be compelled to apply to the courts for protection if the railway company attempts to engage in intrastate business without State authority. They specifically state that they have no representations to make about any extensions either by land or by water which the railway company may desire for interstate business (R. 40, 41).

The appellant is not entitled to maintain this action to prevent the construction and operation of the proposed new ferry to serve new traffic and a different territory. It is not entitled to the interposition of a court of equity to protect its present excessive and illegal profits, secured in large part because the travelling and shipping public outside its natural territory are under the present conditions forced to use its facilities.

The essential conflict here is between the needs of the territory for more adequate transportation facilities on the one hand and a greed for monopolistic profits on the other. The movement for a ferry at Chesapeake Beach had its origin, as appellant admits (Brief, 6), with the citizens of the Eastern Shore and it represents a real public demand. The public interest is paramount and should be allowed to prevail.

Respectfully submitted,

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February 11, 1932.

APPENDIX.

Section 4426 of the Revised Statutes of United States (U. S. C. Title 46, c. 14, par. 404), reads in full as follows:

> "The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this title applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections forty-four hundred and ninety-six, forty-four hundred and ninety-seven,

forty-four hundred and ninety-eight, forty-four hundred and ninety-nine, and forty-five hundred, relating to the imposition and enforcement of law.

"All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life-preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation."

Below are given extracts from General Rules and Regulations prescribed by the Board of Supervising Inspectors, covering bays, sounds, and lakes, other than the Great Lakes. Rule 7—Ferryboats, pages 123-124, reads as follows:

"1. The navigation of ferryboats shall be confined to the ferry routes specified in the certificate of inspection; but such vessels may be permitted to go beyond their authorized routes with passengers only, or, without such permit, to lighten or relieve vessels in distress. When any ferryboat leaves her ferry route and carries passengers, she shall be required to carry the

same officers, crew, and equipment as required of other steamers carrying passengers (Sec. 4426, R. S.).

"2. All ferryboats of more than 75 gross tons carrying passengers for hire, the construction of which is commenced after March 31, 1913, shall be supplied with a sufficient number of water-tight bulkheads to float the vessel if any compartment is flooded. After February 15, 1927, any vessel of 75 gross tons and under which shall be certificated for the first time for any ferry route on which passengers are carried for hire shall be supplied with bulkheads as required by this section, except that such vessels of 75 gross tons or under may, in lieu of such bulkheads, be equipped with substantial air tanks under deck of sufficient capacity to sustain the vessel afloat when full of water, with the full complement of passengers and crew on board. Such air tanks shall be so distributed as to secure maximum stability (Sec. 4426, R. S.).

"3. All ferryboats of 50 gross tons or over shall be equipped with such lifeboats, life rafts, outside ladders, and other means of escape, in case of disaster, as, in the opinion of the inspectors, shall meet the requirements of each particular case. But in no case shall the cubic feet of boat capacity be less than that provided in the table following:

	Cubic feet.
Ferryboats of 50 and not over 300 gross tons	120
Ferryboats over 300 and not over 600 gross tons	240
Ferryboats over 600 gross tons	360

"*Provided*, That ferryboats of more than 300 gross tons shall be equipped with boats or rafts as in the opinion of the inspectors may be necessary in case of disaster to secure the safety of all persons on board (Sec. 4426, R. S.).

"4. All ferryboats shall be equipped with a life preserver for each person carried, and in addition thereto shall have a number of life preservers suitable for children equal to at least 10 per cent of the total number of persons carried. All life preservers shall be distributed in the most accessible places, where they can be reached at all times.

"All ferryboats shall be provided with the same fire apparatus required on passenger steamers of equal tonnage (Sec. 4426, R. S.).

"5. All car-ferry steamers transporting passengers in cars shall carry the same life-saving and fire-fighting equipment as required on ferryboats, excepting that the number of life preservers shall equal the number of persons carried (Sec. 4426, R. S.).

"6. It shall be the duty of the master of any such car-ferry steamer to see that all of the doors of the cars are unlocked and that the vestibules of the cars are open while the cars are on the steamer, to allow the persons so carried free egress at all times" (Sec. 4426, R. S.).